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In the

Supreme Court of the United States

October Term, 1934.

No. 183.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Appellant,

vs.

FRANK W. WEBSTER (Substituted for R. H. Baker) ET AL.,
Appellees.

BRIEF ON BEHALF OF FRANK W. WEBSTER, ET AL., APPELLEES.

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Appellees.

BRIEF ON BEHALF OF FRANK W. WEBSTER, ET AL., APPELLEES.

May It Please the Court:

JURISDICTION.

The Nashville, Chattanooga & St. Louis Railway, appellant, filed a brief in this Court on June 28, 1934, in support of its contention that this Court has jurisdiction to review the present case. This suit was filed under the Declaratory Judgments Act of Tennessee (Sections 8835-8847 of the Code of Tennessee) to have determined the liability of the complainant Railway to contribute to the cost of constructing a railroad underpass. The theory of the bill was that the statute upon which the order was based and the order itself were unconstitutional and void, as violative of the Constitution of the United States.

The decision of the highest court of Tennessee sustained the constitutionality of the statute and of the order made pursuant thereto, thereby adjudicating the liability of the Railway to contribute one-half of the cost of constructing the underpass.

N., C. & St. L. Ry. v. *Baker, Commissioner*, 167 Tenn., 470, 71 S. W. (2d), 687.

An appeal to this Court was perfected under Title 28, U. S. Code, Section 344 (Judicial Code, Section 237 amended).

While the present suit is in form a declaratory proceeding, it is in substance an actual controversy which finally determines, under State law, the rights of the parties.

Counsel for appellees do not resist the jurisdiction of this Court but are of the opinion that the jurisdiction of the Supreme Court of the United States is sustained by Federal statutes and by the decision in the case of *N., C. & St. L. Ry.* v. *Wallace*, 288 U. S., 249, 77 L. ed., 730.

STATEMENT OF THE CASE.

The appellant Railway has been ordered by the Commissioner of Highways and Public Works of Tennessee to contribute one-half the cost of separating a grade crossing upon State Highway No. 20. (R., pp. 9, 419.) The estimated cost of this project is $17,400.00, the contribution demanded of the Railway being $8,700.00. (R., p. 11.) The expense sought to be placed upon the Railway is not unreasonable or excessive. (R., p. 2.) The expenditure of this sum of money by the railroad for a grade

separation will be a capital charge under the rules of the Interstate Commerce Commission to be included in the valuation of the railroad property upon which the railroad will be entitled to earn a fair return. (R., pp. 4, 278.)

The Department of Highways of Tennessee has undertaken the construction of a modern, expensive highway, designated as No. 20, which, when completed, will be a part of the shortest and best route between Nashville and Memphis, the two largest cities in Tennessee. (R., p. 13.) The new State Highway No. 20 is a part of the technical State Highway System proper and is also a Federal Aid Route. (R., p. 184.) Federal aid funds were allocated by the Federal Department of Agriculture, Bureau of Public Roads, toward the construction of State Highway No. 20. (R., p. 202.) This allotment was made under a contract which required that the grade crossing at Lexington be eliminated. (R., p. 202.) However, no federal aid funds were sought or obtained for the construction of the underpass involved in this suit. (R., pp. 187-188.)

That portion of State Highway No. 20 which lay between Lexington and Perryville (adjacent county seats) was an old gravel road, crooked, with steep grades, short curves and many hills. (R., pp. 189, 199, 205, 253.) At times this road was under water. (R., p. 252.) It was a road aptly described by one of the witnesses for the Railway as "no crookeder road in the United States." (R., p. 253.) On account of the unsatisfactory condition of the road, travel was held to a minimum of local traffic. (R., pp. 189, 248.)

As a result of terrific local demand and of a determination to construct another adequate route between Nashville and Memphis, Highway No. 20 was realigned, relocated and reconstructed. (R., pp. 189, 199, 204.) The new road is a modern paved highway with sufficient width, straight, and built with the elimination of grade crossings, of sharp curves and of steep hills in view. (R., pp. 161, 202, 346.) This new route shortens the distance from the Tennessee River to Lexington by about 3½ miles, cutting such distance to about 21 miles. (R., pp. 199-200.)

In the natural course of events the construction of the new road will greatly stimulate and increase traffic, both as to density and as to speed. (R., pp. 192, 203, 219.) This increase in traffic will affect both local travel and through travel. (R., pp. 203, 220.)

Upon the old State Highway No. 20 there were eight railroad grade crossings between Perryville and Lexington. (R., p. 199.) By a relocation of the road seven of these grade crossings have been eliminated from the State Highway System without cost to the Railway. (R., p. 199.) It was necessary in the construction of the new Highway No. 20 that the road cross the main line of the Nashville, Chattanooga and St. Louis Railway at one point. (R., p. 199.) It is at this crossing that an underpass has been built, toward the construction of which the State of Tennessee seeks to compel the Railway to contribute. (R., p. 199.) The crossing in question is located within the limits of the city of Lexington, but it is the crossing of a State Highway. This highway was built and located by the State Department of Highways and not by the county authorities

of Henderson County or the city authorities of Lexington. (R., p. 11.)

The request for the elimination of this crossing has been made by the State Department of Highways pursuant to statute and not by the county or municipal authorities. (R., p. 186.) The old State Highway No. 20 crossed the main line of the appellant Railway in Lexington, Tennessee, at what is known as the Clifton Street crossing. (R., p. 342.) By the relocation of State Highway No. 20 the Clifton Street crossing is no longer a part of this State Highway. (R., p. 199.)

Over the location of the proposed underpass the Railway operates fourteen trains daily, including passenger and freight trains. (R., pp. 14, 311, 342.) Five of the fourteen daily train movements occur between the hours of 10:00 P.M. and 5:00 A.M. (R., p. 316.)

The traffic count taken by the Railway at the underpass on May 2 to May 3, 1933, (24-hour period) revealed a movement of 300 motor units, 19 wagons and 18 horses over new Highway No. 20. (R., p. 321.) The new Highway No. 20, including the underpass, was opened to traffic on February 16, 1933, but the series of highways of which this is a link connecting Nashville and Memphis (231 miles apart), is not yet complete and is therefore not yet attractive to through and interstate traffic. (R., pp. 219, 315.)

In its original bill the Railway made many averments of fact designed to establish the revolution in transportation which has taken place within recent years. These averments of fact are established

by the evidence and are admitted by the stipulation on pages 1 to 7 of the record. At this point it should be pointed out that the facts admitted and stipulated are with reference to the so-called revolution in transportation methods. No allegations of fact contained in the bill or in the proof with reference to the lack of need for an underpass are admitted. On the contrary, the appellees insist that the evidence amply and unquestionably furnishes justification for the construction of an underpass at the railroad crossing in question.

The appellees in their answer deny that the fact of the revolution in transportation methods is material to the determination of the constitutionality of the statute and the order promulgated pursuant thereto requiring the railroad to contribute one-half of the cost to a grade crossing elimination. When the evidence introduced by the Railway with regard to the existence and effect of a revolution in transportation methods is given full credit, the most that can be said is that this evidence sustains the following statement in the amended bill:

> "Until recent years roads and streets were built and financed by the local authorities out of funds raised locally for local travel, and such local roads were feeders to the railroads and not their competitors. Today such roads are financed almost exclusively by the state and federal government as a part of a nation-wide system of through highways for commerce in direct competition with railroads." (R., p. 10.)

This mass of evidence is admitted to justify and to require the following conclusions of fact:

1. Vehicular traffic is now actively and successfully competing with railroads by using public highways.

2. The effect of constructing modern, improved, paved highways through any particular region is to impair the economic condition of the railroad or railroads serving such area.

3. Modern highways are designed and constructed not merely to meet the local traffic conditions and needs but also to furnish a state-wide and even a nation-wide system of trunk highways.

The evidence introduced by the Railway is intended to show that the stimulation of through traffic and of interstate traffic is the primary aim in the construction of modern highways. Appellees deny this. On the contrary, appellees insist that local traffic is greatly stimulated by the modern highway and that it is inaccurate to say that modern highway construction is designed primarily for through or interstate traffic. Such highways serve two purposes, neither of which can be called secondary. These purposes are (a) the encouragement and stimulation of local traffic and travel made in response to an insistent and overwhelming demand; (b) the fostering of state-wide and nation-wide long distance travel.

The theory of appellant's case, as revealed on page 25 of adversary counsel's excellent brief, is that the revolution in transportation requires a modification of principles of constitutional law heretofore announced which sustain the validity of the statute in question.

No abstract of the pleadings will be given, such a synopsis being contained in appellant's brief. However, we do wish to comment upon the opinion of the Supreme Court of Tennessee which, we think, has been misinterpreted by adversary counsel.

On page 4 of appellant's brief it is asserted that the Supreme Court of Tennessee held that a statute valid when enacted continues to be valid regardless of changed conditions. We find nothing in the opinion of the Court which justifies this conclusion. The Supreme Court of Tennessee held that although a municipal ordinance may become void upon a showing of its unreasonableness, the same rule is not applicable to state statutes but that the courts cannot inquire into "the expediency, propriety or even the justice of the statute which violates no provision of the Constitution." (R., p. 421.) This principle of law is identical with that expressed by Mr. Justice Field in *Missouri Pac. R. Co.* v. *Humes*, 115 U. S., 512-520, 29 L. ed., 463-465, when it was said:

> "It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures."

Furthermore, the Supreme Court of Tennessee did not hold that the police power of the State is subject to no limitation as appellant's brief, pages 4, 31, 45 and 46, indicates. On the contrary, the Tennessee Court held that:

> "The State, in the exercise of the police power, may directly or through its municipalities com-

> pel railroads to share the cost of eliminating grade crossings at railroad tracks, . . . and also that the State may relocate a highway or build a new highway, and, when necessary for the public safety, may, by the exercise of the police power, require a railroad whose track is encountered by the new location to share the reasonable cost of eliminating a dangerous grade crossing. . . ." (R., p. 421.)

The Supreme Court of Tennessee further held that the constitutional power of the State to compel railroads to share the cost of eliminating grade crossings was properly exercised under the evidence in this case. (R., p. 429.)

Adversary counsel say that the trial court, with one immaterial exception, found every averment of fact in the bill to be supported by the evidence. The "one immaterial exception" was the finding of the chancellor that the underpass at Lexington was necessary, was properly located, and constructed at a reasonable cost of $17,400.00. (R., pp. 415, 420.) We emphasize this fact in order that it may be clear to this Court that while the fact of a revolution in transportation methods is admitted and the averments of fact in the original bill with regard to such revolution in transportation are stipulated to be true, the necessity and the propriety of the construction of the underpass in question are not challenged.

ARGUMENT

PROPOSITIONS OF FACT.

I.

An underpass should be constructed at the railroad crossing involved because a grade crossing would be dangerous and inconvenient.

(a) It is stipulated that:

> "To consummate the purposes intended by the constituted authorities, state and federal, in the construction of this new highway and incidental underpass, it is agreed that the location of the underpass, its plans and the cost of construction were proper and that it should have been constructed as it was from the standpoint of proper engineering, motor traffic considerations, motor speed, convenience and safety. This agreement is not intended to relate to the division of the cost of construction." (R., pp. 2, 3.)

(b) It is stipulated that:

> "In the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands. This is not intended to agree as to how the cost of such an improvement should be borne." (R., p. 3.)

(c) The highway upon which the railroad crossing in question exists is a modern, expensive high-

way which will be part of the shortest and best route between Nashville and Memphis. (R., p. 13.)

The railroad crossing involved is located upon the main line of the Nashville, Chattanooga & St. Louis Railway. By the construction of the new road, eight grade crossings have been eliminated from the State Highway System. (R., p. 199.) The construction of the new road will greatly increase traffic of all kinds, both as to density and as to speed. (R., pp. 192, 203, 219.)

(d) R. H. Baker, Commissioner of Highways, O. F. Goetz, Highway Engineer (now acting Commissioner), T. C. McEwen, Chief Highway Engineer, and J. E. Moreland, Highway Engineer, testified that the construction of this underpass was necessary for the safety of the traveling public. (R., pp. 199, 219, 232, 237.)

II.

The cost of the underpass in question is not unreasonable or excessive.

(a) It is stipulated that the cost of the construction was proper and that the underpass should have been constructed as it was from the standpoint of proper engineering, motor traffic considerations, motor speed, convenience and safety. (R., pp. 2, 3.)

PROPOSITIONS OF LAW.

I.

A state has the constitutional power to require the abolition of grade crossings upon public highways for the reasonable safety of the public. This police power includes the abolition of grade crossings upon newly laid out public highways.

New York N. E. R. Co. v. *Bristol*, 151 U. S., 556, 38 L. ed., 269;

Northern Pacific Railway Co. v. *Minnesota, ex rel., Duluth*, 208 U. S., 583, 597, 52 L. ed., 630, 636;

Chicago, Milwaukee & St. Paul R. Co. v. *City of Minneapolis*, 232 U. S., 430, 438, 58 L. ed., 671, 674;

Missouri Pacific R. Co. v. *Omaha*, 235 U. S., 121, 127, 59 L. ed., 157, 160;

Erie R. Co. v. *Board of Commissioners*, 254 U. S., 394, 65 L. ed., 322;

Missouri, etc. R. Co. v. *Oklahoma*, 271 U. S., 303, 70 L. ed., 957;

Lehigh Valley R. Co. v. *Board of P. U. Commissioners*, 278 U. S., 24, 73 L. ed., 161;

N., C. & St. L. Ry. Co. v. *White*, 278 U. S., 456, 73 L. ed., 452;

Dyer County v. *Railroad*, 87 Tenn., 712;

City of Harriman v. *Southern Ry. Co.*, 111 Tenn., 538;

Chattanooga v. *Southern Ry. Co.*, 128 Tenn., 399;

N., C. & St. L. Ry. v. *Drainage District*, 149 Tenn., 491;

Cincinnati, N. O. & T. P. Ry. Co. v. *Chattanooga*, 166 Tenn., 626;

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Chicago, etc. R. Co. v. *Illinois Commerce Commission* (1927), 326 Ill., 625, 158 N. E., 376;

Sidney v. *Wabash R. Co.* (1928), 333 Ill., 126, 164 N. E., 201;

Morris v. *Indianapolis*, 177 Ind., 369, 94 N. E., 705;

Olear v. *Penna. R. Co.* (1928), 249 N. Y., 364, 164 N. E., 251;

Re Staten Island Rapid Transit R. Co. (1927), 220 App. Div., 80, 221 N. Y. S., 129;

Transit Commission v. *Long Island R. Co.* (1930), 239 N. Y. S., 543;

North Dakota Highway Commission v. *Great Northern R. Co.* (1924), 51 N. D., 680, 200 N. W., 796;

State, ex rel. Wabash R. Co. v. *Public Service Commission* (1924), 306 Mo., 149, 267 S. W., 102;

Baltimore & O. R. Co. v. *Public Utilities Commission* (Ohio, 1930), 171 N. E., 854;

Chicago, etc. R. Co. v. *Railroad Commission* (Wisc., 1925), 204 N. W., 606;

Norwood v. *New York & N. E. R. Co.* (1894), 161 Mass., 259, 37 N. E., 199;

Re Brookline (1920), 236 Mass., 260, 128 N. E., 97;

Erie R. Co. v. *Public Utilities Commission* (1916), 89 N. J. L., 57, 98 Atl., 13;

51 Corpus Juris, 691;
22 R. C. L., 787;
Annotations, 55 A. L. R., 660 and 62 A. L. R., 805.

(a) In *New York N. E. R. Co.* v. *Town of Bristol*, 151 U. S., 556, 38 L. ed., 269, 273, the constitutionality of an act which required railroads to bear part of the cost of grade crossing elimination was sustained. The contentions here presented were expressly refuted. The Court said:

> "The argument is that the existing grades of railroad crossings were legally established, in accordance with the then wishes of the people, but, with the increase in population, crossings formerly safe had become no longer so; that the highways were chiefly for the benefit of the local public, and it was the duty of the local municipal corporation to keep them safe; that this law applied to railroad corporations treatment never accorded to other citizens in allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on those companies, and in that respect, and in the exemption of the town from its just share of the burden, denied to them the equal protection of the law."

In rejecting this argument this Court held that railroad corporations are subject to legislative control in all respects necessary to protect the public against danger, that this Court cannot proceed upon general ideas of the requirements of natural justice and that there is no transgression of constitutional power when a state requires a railroad to bear the cost of a grade crossing separation.

(b) In the case of *Chicago, M. & St. P. R. Co.* v. *Minneapolis*, 232 U. S., 430, 438, 58 L. ed., 671, 674, this Court said:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

(c) In the case of *Missouri P. R. Co.* v. *Omaha*, 235 U. S., 121, 127, 59 L. ed., 157, 160, this Court said:

> "That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudication of this court. . . .
>
> "This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted."

(d) In *Erie Railroad Co.* v. *Board of Public Utility Commissioners*, 254 U. S., 394, 65 L. ed., 322, the constitutionality of an order requiring a railroad corporation to abolish fourteen grade crossings at an expenditure of more than $2,000,000.00 was sustained. In this case, the Court said:

> "Most of the streets concerned were laid out later than the railroads, and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the state to throw the burden of this improvement upon the railroad. This is the fundamental question in the case. It might seem to be answered by the summary of the decisions given in *Chicago, M. & St. P. R. Co.* v. *Minneapolis*, 232 U. S., 430, 58 L. ed., 671, 674, 34 Sup. Ct. Rep., 400: 'It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways.' *Missouri P. R. Co.* v. *Omaha*, 235 U. S., 121, 59 L. ed., 157, 35 Supt. Ct. Rep., 82; *Northern P. R. Co.* v. *Puget Sound & W. H. R. Co.*, 250 U. S., 332, 63 L. ed., 1013, 39 Sup. Ct. Rep., 474. For although the statement is said to be explained as a matter of state law by the previous decisions in Minnesota, it is made without reference to those decisions or to any local rule; and, moreover, the intimation of the judgment in the present case is that whatever may have been the earlier rulings, the law of New Jersey now adopts the same view. . . .
>
> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the

public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. . . .

> "If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

(e) In *Missouri, K. & T. T. Co.* v. *Oklahoma*, decided May 24, 1926, and reported in 271 U. S., 303, 70 L. ed., 957, the principle stated in the cases above referred to was again announced. The Court said:

> "It is elementary for the safety and convenience of the public, the state, either directly or through its municipalities, may reasonably regulate the construction and use of highways where they cross railroads. The legitimate exertion of police power to that end does not violate the constitutional rights of railroad companies. They may be required at their own expense to construct bridges or viaducts whenever the elimination of grade crossings reasonably may be required, whether constructed before or after the building of the railroads."

(f) In *Lehigh Valley R. Co.* v. *Board of P. U. Commissioners*, 278 U. S., 24, 73 L. ed., 161, this Court sustained an order requiring a railroad to eliminate two grade crossings at a cost of $324,000.00. In this case the action of the Public Utilities Commissioners was sustained although a different method of eliminating the grade crossing which was proposed by the railroad, would have resulted in saving the railroad company $100,000.00. The Court again held that a railroad company may be required to eliminate grade crossings at highways where the danger to the public from their existence is clear. An important limitation upon the doctrine of earlier cases, which this case may be said to announce, is that when

the reasonableness of the cost is questioned it is for the courts to determine whether the cost is within reasonable limits. After affirming the principles heretofore referred to the Court said:

> "This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroiad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits."

(g) In *N., C. & St. L. Ry.* v. *White*, 278 U. S., 456, 73 L. ed., 452, the railway challenged the right of a municipality to require the maintenance of a flagman at a highway crossing. The railroad insisted that it had already installed an electric appliance which was cheaper and in some ways better than the presence of a flagman. The Court held that the argument in favor of the railroad was a legislative argument to be addressed to the legislature and not to the courts and that the legislature was entitled to determine what safety devices at the crossing were necessary, subject, of course, to the right of the courts to ascertain whether the legislature had adopted a method without any basis in reason or fact.

The Supreme Court of Tennessee in its determination of the same case (158 Tenn., 407), held that to authorize the judicial setting aside of the legislative discretion as to what was necessary at a particular railroad crossing, there must be a clearly unreason-

able regulation. The Court said the legislature has a right to express its judgment as to the means of protection most conducive to the safety of the public and that the power of the Court is limited to a determination of whether or not the regulation was unreasonable.

(h) *Chicago, St. P. M. & O. R. Co.* v. *Holmberg*, 282 U. S., 162, 75 L. ed., 270, illustrates the limitation of the principle under discussion. This case, however, does not modify or qualify the extent of the police power in grade crossing separations announced in earlier cases. In this case it was held that a railroad may not be required to construct an underpass solely for the convenience and benefit of the land owner when an existing surface crossing is not dangerous and is a private crossing. The decision in this case clearly turned upon the fact that the crossing at which the railroad was ordered to construct an underpass was not a public crossing but was a private crossing and the Supreme Court held that this was not a proper exercise of the police power.

(i) In *City of Harriman* v. *Southern Ry. Co.*, 111 Tenn., 539, it was held that a municipal corporation may compel a railroad to erect a viaduct over its track at a public street crossing although the railroad tracks were laid before the street was built or the city was incorporated.

In *City of Chattanooga* v. *Southern Ry. Co.*, 128 Tenn., 399, the constitutionality of an act authorizing a city to require railroad companies to build at their own expense approaches over their track when crossing streets, was sustained as a proper exercise of the police power. This Tennessee case even

went so far as to hold the statute not to impair the obligation of a contract because a city had contracted with the railroad to maintain a suitable bridge at a crossing. This same conclusion, holding a statute valid as a police measure notwithstanding a conflicting contract, was reached by this Court in *Northern Pacific Ry. Co.* v. *State of Minnesota, ex rel.*, 208 U. S., 583, 52 L. ed., 630.

In *N., C. & St. L. Ry.* v. *Drainage District*, 149 Tenn., 490, it was held that a state may directly, or through municipal agency, compel a railroad company to maintain a bridge already erected over a public road, remodel it, or build a new one, if public safety, welfare or necessity requires such an exercise of the police power.

In *Cincinnati, N. O. & T. P. Ry. Co.* v. *Chattanooga*, 166 Tenn., 626, which case involved the liability of a railroad company to abutting property owners who were damaged by the construction of a viaduct, this Court said:

> "The right of the city to require the railway companies to construct said viaduct and approaches entirely at their own expense is not questioned, and is well supported by the authorities."

(j) In *Baltimore & O. R. R. Co.* v. *Public Utilities Commission of Ohio*, 122 Ohio St., 380, 171 N. E., 854, it was held that the director of highways may relocate a highway so as to eliminate a grade crossing or he may relocate a highway so as to create a new grade crossing and then require a railroad to contribute to the cost of eliminating the new grade crossing created. In other words, it was held that

the fact that a grade crossing is created by building a new state highway does not relieve the railroad from the necessity of contributing to its elimination.

(k) In *Chicago and N. W. R. Co.* v. *Illinois Commerce Commission*, 326 Ill., 625, 158 N. E., 376, the validity of an order requiring a railroad to contribute to the construction of an underpass was sustained, notwithstanding that there was an existing underpass on the state highway in question and that the new crossing was created because of the desire to shorten or cut off a part of the old route. In this case there was no question of danger whatever because there was an existing grade separation but when a new grade crossing was created by rerouting the state highway, the railroad was required to contribute to the cost of its elimination. The Court said that a railroad is a public utility, and, in accepting its franchise from the state, agrees to submit to all burdens, conditions and regulations imposed by the state with reference to its tracks and their intersection with highways necessary to promote and secure safety of the traveling public.

(l) In *Chicago, M. & St. P. R. Co.* v. *Railroad Commission* (Wis.), 204 N. W., 606, the Court declined to consider the argument that it would benefit bus line competitors of a railroad to require the latter to bear part of the expense of relocating grade crossings. The Court held that this argument could be addressed only to the legislature. In the opinion it is said:

> "Touching for a moment the other contention made, that it is unfair to require the railroads to contribute to the building of highways for the benefit of their competitors, it is to be said that

highways are not primarily built for any class of people. They are public in their nature, and the bus lines are entitled to use them, subject to legislative regulation and restriction, along with all other members of society. The perfection of the automobile has worked a great transformation in the matter of public travel. Our people demand better highways, and the state is responding to their demands in this respect. These highways are not built for bus line competitors of the railroads. They are built for all the people, and it is no argument whatever against the justice of requiring railroad companies to bear a portion of the expense, in minimizing the danger incident to grade crossing, which is increasing in proportion to the increased use of our public highways. This burden is placed upon railroads to promote the public safety by removing sources of dangers which the railroads have created. This is the fundamental basis of the state's power and the state's action in these respects. At any rate, this argument is not one that may be entertained by a court. If it has any force, as a legitimate argument anywhere, it may properly be addressed only to the Legislature."

(m) *North Dakota Highway Commission* v. *Great Northern Ry. Co.* (N. D., 1924), 200 N. W., 796, holds constitutional the statute of Iowa under which railroads are required to contribute to the cost of abolishing grade crossings. The crossing in question was upon a highway known as a federal aid project, but the traffic movement over the crossing was reasonably light, varying from 135 to 256 daily movements. The Court held the statute valid

and the abolition order warranted, pointing out that under the Federal Highway Acts this road is known as a primary highway for the reason that it is interstate in character.

(n) In some of the cases particular orders made pursuant to a statute have been declared unreasonable as not justified by the public safety and convenience. For example, *Chicago and N. W. R. Co.* v. *Railroad Commission* (Wis.), 238 N. W., 365, held an order of the Public Service Commission to be unreasonable. In this case there was an order directing a railroad company to construct a bridge at a highway intersection. There was in fact no grade crossing then in existence, although the highway intersection already existed. A bridge had already been constructed over which motor vehicle traffic was conveyed but this structure had become inadequate to care for the traffic. The order, successfully challenged as unreasonable, required the railroad to construct a concrete, steel or other permanent structure to replace the existing pile bridge at its sole expense.

In re Elimination of Grade Crossing, etc. (Ohio), 179 N. E., 139, holds an order for the separation of a grade crossing unreasonable and void. The evidence in that case disclosed that there was no substantial interruption of vision in either direction preventing vehicular traffic from seeing approaching trains, that flash light signals had been installed two years prior to the hearing, that since that time no crossing accident had occurred, that the plan of underpass construction would obscure the vision of vehicular traffic and that the cost of the project would be approximately $250,000.00. All that is determined by this case is that a particular elimination

was "unnecessary and inexpedient" in view of the large expenditures which would be required.

Town of Sidney v. *Wabash Railroad Co.* (Ill.), 164 N. E., 201, holds that orders of the Illinois Commerce Commission requiring a separation of grades are subject to review by the courts as to the reasonableness of the order and that unreasonable orders are illegal. The case holds an order unwarranted, and therefore void, where the evidence showed that highway traffic was moderately light, that train movements were not numerous, that there was a clear view of trains approaching, that risks to traveling public could be lessened by installation of certain devices, that no accident had ever occurred at the crossing, and that the cost of the separation would be about $48,000.00. Moreover, the road in question *was not a part of any State Highway System*, a fact emphasized by the Court in stating its conclusion.

II.

The police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals or safety.

Lake Shore & M. S. R. Co. v. *Ohio*, 173 U. S., 285, 292, 43 L. ed., 702, 704;

Chicago B. & Q. R. Co. v. *Ill.*, 200 U. S., 561, 592, 50 L. ed., 596, 609;

Bacon v. *Walker*, 204 U. S., 311, 317, 51 L. ed., 499, 502;

Chicago & A. R. Co. v. *Tranbarger*, 238 U. S., 67, 59 L. ed., 1204.

(a) In the case of *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S., 285, 43 L. ed., 702, this Court sustained an Ohio statute as against the contention that it was an unconstitutional regulation of interstate commerce. In the opinion it is said:

> "It is insisted by counsel that these and observations to the same effect in different cases show that the police powers of the states, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the national Constitution is concerned, to regulations pertaining to the health, morals, or safety of the public, and do not embrace regulations designed merely to promote the public convenience.
>
> "This is an erroneous view of the adjudications of this court. While cases to which counsel refer involved the validity of state laws, having reference directly to the public health, the public morals, or the public safety, in no one of them was there any occasion to determine whether the police powers of the states extended to regulations incidentally affecting interstate commerce, but which were designed only to promote the public convenience or the general welfare. There are, however, numerous decisions by this court to the effect that the states may legislate with reference simply to the public convenience, subject, of course, to the condition that such legislation be not inconsistent with the national Constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class."

(b) In *Chicago B. & Q. R. Co.* v. *Illinois, ex rel.*, 200 U. S., 561, 50 L. ed., 596, this Court determined that to require a railroad company to bear the entire expense of removing and rebuilding a railway bridge, made necessary by the proposed widening of a channel of a creek, did not violate any constitutional right. The Court said:

> "We hold that the police power of a state embraced regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

This holding is especially applicable in the case at bar because the railway's contention is that a grade crossing on the highway would not be dangerous if all motor vehicles were required to stop. There is no contention that such grade crossing at the intersection of the railway's main line and a main state highway would not be very inconvenient.

(c) In *Bacon* v. *Walker*, 204 U. S., 311, 317, 51 L. ed., 499, 502, the Court said:

> "These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S., 561, 592, 50 L. ed., 596, 609, 26 Sup. Ct. Rep., 341. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to pro-

mote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

III.

The proportion of the expense which a railroad company will be required to bear in the elimination of a grade crossing is a matter exclusively within the control of the legislature.

Chicago, B. & Q. R. Co. v. *Illinois, ex rel.*, 200 U. S., 561, 50 L. ed., 596;
Chicago, M. & St. P. R. Co. v. *Minneapolis*, 232 U. S., 430, 58 L. ed., 671;
Erie Railroad Co. v. *Board of P. U. Commissioners*, 254 U. S., 394, 65 L. ed., 322.

(a) In *Chicago, B. & Q. R. Co.* v. *Illinois, supra*, this Court held that the imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of a creek, did not amount to an unconstitutional taking of private property for public use.

(b) *Chicago, M. & St. P. R. Co.* v. *Minneapolis, supra*, it was held that the expense of constructing and maintaining the necessary bridge over the gap in a railway right of way made by the municipal construction across it of a canal or water way with footpaths on each side connecting two lakes used for public recreation may be cast upon the railway company without denying it due process of law.

(c) In *Erie Railroad Co.* v. *Board of Public Utility Commissioners, supra*, this Court said:

"We agree with the contentions below that, as the railroad company might have been charged with the whole expense, the fact that no more than ten per centum of the cost of three crossings is thrown upon a street railway company is a matter of which it cannot complain."

IV.

Engagement in interstate commerce does not destroy the right of a state to compel a railroad company to abolish a highway grade crossing.

Erie Railroad Co. v. *Board of Public Utility Commissioners*, 254 U. S., 394, 410, 65 L. ed., 322, 334.

(a) In the Erie case, this Court said:

"If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & R. G. R. Co.* v. *Denver*, 250 U. S., 241, 246, 63 L. ed., 958, 962, 39 Sup. Ct. Rep., 450. To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens."

(b) This principle is but one phase of the more general principle that regulations are not invalid merely because they affect interstate commerce incidentally.

Hall v. *Geiger Jones Co.*, 242 U. S., 539, 61 L. ed., 480;

Nashville, C. & St. L. Ry. v. *Wallace*, 288 U. S., 249, 267, 77 L. ed., 730;

Denver Rio Grande R. Co. v. *Denver*, 250 U. S., 241, 63 L. ed., 958;
Honnold's Supreme Court Law, page 361 and cases therein cited.

V.

The public policy of Tennessee is not to minimize restrictions and taxes on common carriers by motor vehicle and to impose restrictions and taxes on common carriers by railroad.

(a) The public policy of the State is to be found in its constitution, its statutory enactments and its judicial decisions.

Hartford Fire Ins. Co. v. *Chicago, M. & St. P. R. Co.*, 175 U. S., 91, 44 L. ed., 84;
Clark v. *Railroad*, 123 Tenn., 232, 240;
50 Corpus Juris, 858, 859, and cases therein cited.

(b) The Constitution of Tennessee, Article 2, Section 28, requires that all property shall be taxed equally. The taxing statutes of Tennessee make no distinction or discrimination between property belonging to common carriers operating by railroad and property belonging to common carriers operating by motor vehicle.

(c) The bill does not allege and the evidence does not reveal any intentional or systematic discrimination in the administration of the statutes of Tennessee by its public officials.

(d) The statutes of Tennessee regulate and tax the operation of motor vehicles in the following particulars:

The Code of Tennessee, Section 1126, *et seq.*, and Chapter 11, Acts of Second Extra Session of 1931, levy a privilege tax of 7c per gallon upon the sale and/or storage of gasoline.

The Code of Tennessee, Section 1149, *et seq.*, as amended by Chapter 36, Acts of 1933, levies substantial registration fees upon motor vehicles. For example, the annual fee upon a 1½ ton truck (factory rating) is $25.00, and the fee for registration of a 3 ton truck (factory rating) is $70.00.

Chapter 82 of the Public Acts of 1931 regulates the operation of vehicles upon public highways and provides penalties for violations of the law. This statute forbids any person to drive any vehicle upon any road, street or highway, carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, and without due caution and circumspection at a speed and in a manner so as to endanger or be likely to endanger any person or property. This statute, among other regulations, requires that the driver of every motor vehicle shall come to a full stop at any railroad crossing when a clearly visible and positive signal gives warning of the approach of a train, or when any such crossing is designated and signposted by the Highway Department as a particularly dangerous crossing.

Chapter 35 of the Public Acts of 1933 regulates the weight, length, width, speed and braking facilities of motor trucks operating upon public highways. By the provisions of this statute motor vehicles subject to the Act are required to weigh in the aggregate not exceeding 18,000 pounds; to have a length not exceeding 27 feet (except that a vehicle and trailer may have a total length not exceeding 35 feet); to have

a width of not exceeding 8 feet or a height not exceeding 12 feet and to operate at a maximum speed of not exceeding 35 miles per hour. This statute was held constitutional by the Supreme Court of Tennessee in *Hoover Motor Express Co., Inc.*v . *Fort, et al.*, 167 Tenn., 628, the appeal from which decision was dismissed by this Court on November 12, 1934, for the want of a substantial Federal question.

Chapter 114 of the Public Acts of 1933 requires the operators of motor vehicles using the highways for the transportation of property to pay the State reasonable compensation for the use of its highways. This Act imposes a mileage tax of one-half (½) cent per mile traveled by each motor vehicle of one ton and not more than three tons capacity. It imposes a mileage tax (or compensation) of one cent (1c) per mile traveled by each motor vehicle of from three tons capacity. By the provisions of Chapter 13, Acts of the Second Extra Session of 1931, Item 108, a mileage tax is also imposed upon motor busses carrying passengers upon the public highways.

Chapter 119 of the Public Acts of 1933 regulates the operation of motor vehicles for the transportation of persons or property for compensation upon the public highways. This statute regulates common carriers and contract haulers, requiring that all carriers for compensation shall be licensed. In the issuance of any license, including an interstate hauler's permit, the Railroad and Public Utilities Commission is required to give reasonable consideration to the nature of the highways over which the license is applied for, to the effect of such operation thereon and upon the traveling public using said highway, and to the nature and character and probable condition of the vehicles to be used upon said highway. In

the issuance of intrastate licenses, the Commission is also required to give reasonable consideration to the transportation service being furnished by any railroad or other carrier on the route or in the territory in which the applicant proposes to operate and to the effect which such proposed transportation service may have upon other transportation service being rendered. Railroads and other carriers are declared to be interested parties entitled to notice of such applications and entitled to be heard with respect to the granting of such permits.

(e) In *City of Memphis* v. *Southern Ry.*, 167 Tenn., 181, the Supreme Court of Tennessee held that the statute involved in the case at bar (Chapter 132, Acts of 1921, Code of Tennessee, Sec. 2638, *et seq.*), evinced a legislative policy to require railroads to pay only part of the cost of eliminating grade crossings so that a municipality could not require a railroad to construct an underpass at its own entire expense. Thus construed, the statute requires railroads to contribute to grade crossing separations upon state highways, but it also prohibits a municipality or other governmental agency from assessing more than one-half the cost of a separation against a railroad company. In the absence of this statute a municipality might assess against a railroad the entire cost of eliminating a dangerous crossing. The statute thus imposes a burden and also gives protection to railroads.

(f) The fact that taxes collected from the operations of motor vehicles are generally used for the construction of highways and the payment of highway indebtedness does not prevent such taxes from being used for a public purpose. The construction

of public highways is purely a governmental function and the highways of a state are public property.

Stephenson v. *Binford*, 287 U. S., 251, 264, 77 L. ed., 288, 294;

Packard v. *Banton*, 264 U. S., 140, 144; 68 L. ed., 596, 607;

13 Ruling Case Law 79.

VI.

Whether or not economic conditions have so changed that statutes requiring railroads to bear the cost, or a part of the cost, of grade crossing separations, ought to be repealed or modified presents a question of public policy exclusively within the control of the Legislature.

McLean v. *Arkansas*, 211 U. S., 539, 547, 53 L. ed., 315, 319;

Chicago, B. & Q. R. Co. v. *McGuire*, 219 U. S., 549, 569, 55 L. ed., 328, 339.

German Alliance Ins. Co. v. *Lewis*, 233 U. S., 389, 414, 58 L. ed., 1011, 1022;

Green v. *Frazier*, 253 U. S., 233, 240, 64 L. ed., 878, 882;

Motlow v. *State*, 125 Tenn., 547, 589;

Quinn v. *Hester*, 135 Tenn., 374, 380;

N., C. & St. L. Ry. v. *Marshall Co.*, 161 Tenn., 236, 247.

(a) In *McLean* v. *Arkansas*, 211 U. S., 539, 547, 53 L. ed., 315, 319, this Court, sustaining the validity of a state statute, said:

> "The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views

inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

(b) In *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S., 549, 569, 55 L. ed., 328, 339, also sustaining the validity of a state statute, this Court in an opinion prepared by the present Chief Justice, said:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

(c) In *Green* v. *Frazier*, 253 U. S., 233, 240, 64 L. ed., 878, 882, also sustaining the validity of a state statute, this Court said:

"Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which, under our system, is reposed in the people or other departments of government."

(d) In numerous cases the Supreme Court of Tennessee has asserted the same principles. In *Motlow* v. *State*, 125 Tenn., 547, at 589, it is said:

"The police power is a necessary one, inhering in every sovereignty, for the preservation of the public safety, the public health, and the public morals. It is of vast and undefined extent, expanding and enlarging in the multiplicity of its activities as exigencies demanding its service arise in the development of our complex civilization. It is a function of government solely within the domain of the legislature to declare when this power shall be brought into operation, for the protection or advancement of the public welfare. It is said that the courts have the right to determine whether such law is reasonable. By this expression, however, it is not meant that they have power to pass upon the act with a view to determining whether it was dictated by a wise or a foolish policy, or whether it will ultimately redound to the public good, or whether it is contrary to natural justice and equity. These are considerations solely for the legislature. In determining whether such act is reasonable, the courts decide merely whether it has any real tendency to carry into effect the purposes designed—that is, the protection of the public safety, the public health, or the public morals—and whether that is really

the end had in view, and whether the interests of the public generally, as distinguished from those of a particular class, require such interference, and whether the act in question violates any provision of the State or federal constitution."

(e) In *Quinn* v. *Hester*, 135 Tenn., 373, at 380, it is said:

"The arguments made against the validity of this statute when analyzed reduce themselves to questions of policy, with which this court has nothing to do. The power of the legislature is limited only by the Constitution, and when we come to search the Constitution we find no provision thereof forbidding the enactment of such law."

VII.

The statute in question affords an opportunity to be heard and an opportunity for judicial review.

Code of Tennessee, Sections 2638, *et seq.*, and 9008, *et seq.*;
Lehigh Valley R. Co. v. *Board of P. U. Commissioners*, 278 U. S., 24, 73 L. ed., 161;
Southern Railway Co. v. *Virginia*, 290 U. S., 190, 78 L. ed., 260;
N., C. & St. L. Ry. v. *Baker*, 167 Tenn., 470.

(a) The statute herein involved contains the following provision:

"When any such grade crossing is ordered to be eliminated, the commissioner shall determine the location of the crossing to be substituted and the grade thereof whether it shall pass over or

under the railroad tracks; provided, on appeal from any such order by the railroad company affected, to the railroad and public utilities commission, that that commission shall have the power to make any change in the order appealed from with regard to the location and grade of the crossing to be constructed which may appear to said commission to be necessary to adequately protect the safety of passenger and freight traffic on said railroad; and provided, further, that said appeal must be made within thirty days of the date the order appealed from is certified to the railroad company affected, and disposition of said appeal must be made within thirty days of the date said appeal is made, unless the commissioner of said department and the railroad company agree on a further extension of time."

(b) This statute, as construed by the Supreme Court of Tennessee, provides for a right of appeal by which the railroad may have the action of the Highway Commissioner reviewed by the Railroad and Public Utilities Commission.

N., C. & St. L. Ry. v. *Baker*, 167 Tenn., 470, 472.

(c) The Code of Tennessee, Sections 9008-9018, provide that any one who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of the state may have said order or judgment reviewed by the courts. The review provided for by this statute is upon the proof introduced before the board or commission, together with such other evidence as either party may desire to introduce.

When the grade crossing separation statute of Tennessee is construed in connection with the statutes referred to, it merely provides for the issuance of an order by the Highway Commissioner in the nature of a show-cause order requiring a railroad to contribute to the cost of a separation. If the railroad wishes to contest its liability, a full and original judicial proceeding is provided in which all questions of law and of fact may be raised. The Highway Commissioner's ruling upon the fundamental question of whether or not public convenience and necessity require an elimination is not final. Thus the failure to provide for notice and a hearing prior to the order of the Commissioner of Highways is immaterial because the railroad is given the right to a hearing *de novo* under the statutes referred to. The Tennessee statute, as construed by the Supreme Court of Tennessee, is essentially different from the Virginia statute before this Court in *Southern Railway Co.* v. *Virginia*, 290 U. S., 190. Indeed, the Railway has been afforded a full and complete review in the present suit (a declaratory judgments proceeding).

The appellant railway, either at the time the order was made or at any subsequent time, including the present appeal, did not question the validity of the statute upon the ground that no opportunity for adequate judicial review was provided.

SUMMARY OF ARGUMENT.

I.

Public safety and public convenience require the construction of an underpass at the railroad crossing in question and the cost of this separation is not unreasonable or excessive.

II.

A state may require railroads at their own expense to abolish grade crossings upon public highways, including crossings upon newly laid out public highways. When such separation is demanded, the question for judicial determination is whether or not public safety and convenience require the abolition in view of the expenditures involved.

III.

The police power embraces regulations designed to promote the public convenience or the general welfare, as well as those in the interest of public health, morals or safety.

IV.

Since regulations are not invalid merely because they affect interstate commerce incidentally, it follows that the power of a state to compel a railroad company to eliminate a grade crossing is not affected by the fact that such railroad is an interstate carrier.

V.

The public policy of Tennessee, as revealed by the Constitution, statutes and judicial decisions of the State, does not discriminate between railroads and their competitors by motor vehicle.

VI.

Even if the taxing statutes of Tennessee contained an unconstitutional discrimination in favor of motor carriers and adverse to railroads, such fact would not invalidate a statute, otherwise constitutional, enacted under the police power.

VII.

Whether or not economic conditions have so changed that statutes requiring railroads to bear the cost, or a part of the cost, of grade crossing separations ought to be repealed or modified presents a question of public policy exclusively within the control of the legislature.

VIII.

The grade crossing separation statute of Tennessee affords the railroad an opportunity to be heard and an opportunity for judicial review.

IX.

The state may exercise police power by eliminating grade crossings from state highways without request from municipal, county or other local authorities.

X.

The public officers directing the elimination herein involved had the necessary information to conclude that the grade separation was essential in the interest of public safety and convenience.

XI.

State highways are not the right of way of a competitor of railroads, but are public property. Their

primary and preferred use is for private purposes and their use for purposes of gain is special and extraordinary.

XII.

State highways are built for local and intrastate traffic, for social use and for private use as well as for the encouragement and stimulation of interstate traffic.

CONCLUSION.

Most of the propositions of law and of fact relied upon in the summary of argument above given have been covered and these will not be enlarged upon now. This conclusion will be confined to a few matters not heretofore elaborated upon.

The brief for appellant asserts as a proposition of law that constructing highways and making them safe for nonexistent or anticipated fast, heavy commercial traffic, in direct competition with railroads, is not an exercise of the police power. Which of the elements contained in this statement prevent the construction of a grade separation from being an exercise of the police power, is not clear. The construction and maintenance of public highways is purely a governmental function. The elimination of grade crossings over public highways, by which the public safety and convenience are promoted, has been declared to be an exercise of the police power in numerous cases. For example, in the case of *Missouri P. R. Co.* v. *Omaha*, 235 U. S., 121, 127, this Court, referring to a grade crossing elimination, said that "this is done in the exercise of the police power."

Adversary counsel would not insist that the fact that the traffic was nonexistent, if reasonably anticipated, prevented the elimination from being an exercise of the police power, for this insistence would be the advancing of an argument already rejected by this Court, e. g., that separations cannot be required upon newly laid out highways. The fact that the traffic is fast and heavy affords no support to the idea that making it safe is not an exercise of the police power. The character of the traffic is not the

determinative element but the existence of danger and of public inconvenience is the test. Since the police power includes everything essential to the public health, morals, comfort and general welfare, it necessarily includes the elimination of grade crossings.

Appellant's brief also places emphasis upon the fact that neither the city nor county authorities ever suggested the need for this grade separation. The reason for this is clear. The grade separation in question was one upon a newly constructed State highway. No request from local authorities could be made because the demand for separation by the State came before this highway was ever opened to traffic. Furthermore, it is not essential to an exercise of the police power by the State that local authorities should request the elimination. It would be evidence that the elimination was unnecessary if the crossing to be separated were in actual use and if the local authorities in such situation did not seek the change. However, the existence of the power of the State to eliminate the crossing could not depend upon the local authorities. Appellant relies upon the fact that the Clifton street crossing was not designated as a dangerous one by the Tennessee State officials. However, appellant's brief (page 19), quotes the estimate of highway engineers without contradiction that through motor traffic on the new road would increase 1000%. Under these circumstances, it is clear that the test of danger and convenience at the new crossing is not to be measured by the existence of danger at the old crossing.

The only question with regard to the danger of the crossing to be eliminated which arises in this suit is the danger which would result from a new grade

crossing upon the newly constructed highway. The record contains abundant and undisputed evidence that in view of the anticipated increase in traffic, in view of the nature of traffic which will use the new highway and in view of its speedier route, a grade crossing thereon would be dangerous and very inconvenient.

Collier v. *Baker*, 160 Tenn., 571, is relied upon by appellant for the proposition that an exercise of the police power over roads within municipalities is to be exercised by the local authorities to the exclusion of State officials. This case merely held that the selection of city streets by the State Highway Department for the routing of State highways did not withdraw such streets from the police power of the city. In other words, municipal regulations with respect to movement of traffic apply to State highways within the city limits. Of course, this is a matter of Tennessee law and the construction given the statute by the Supreme Court of Tennessee in the case at bar to the effect that the State may require a railroad to eliminate a grade crossing upon a State highway within a municipality is conclusive as regards the interpretation of the statute, leaving open only the question of its constitutional validity so construed.

Appellant's brief emphasizes the fact that the State officials ordering this separation did not know how many trains appellant ran or at what hours. It is insisted that such knowledge was essential. The officers directing this elimination knew that they were dealing with a main State highway connecting the two largest cities in Tennessee. They knew that the crossing in question was upon the main line of appellant railway. It was not essential, we respect-

fully submit, that they determine the number of trains or their hourly schedules. The order issued by them was subject to judicial review and to a determination *de novo* with regard to its propriety and necessity. Under these circumstances the Commissioner of Highways cannot be said to have acted in ignorance of the facts.

Appellant's brief insists that the use of State and federal aid roads is no longer primarily either local or social but commercial. We deny this. On the contrary, we insist that local traffic is greatly stimulated by the modern highway and that it is inaccurate to say that modern highway construction is designed primarily for commercial or interstate traffic. It is true that such highways serve two purposes, neither of which can be called secondary. These purposes are the encouragement and stimulation of local traffic and the fostering of state-wide and nation-wide long distance travel. The Commissioner of Highways testified that the primary object in the construction of new Route No. 20 was the connection of adjacent county seats in Tennessee and the opening up of country which has not heretofore been served with adequate roads. (R., p. 188.)

We believe that the appellant falls into the error of assuming that public highways have been constructed and are being constructed for operators for hire. On page 47 of appellant's brief it is said that where a new right-of-way of a commercial transportation company crosses the right-of-way of an existing commercial road the new one must pay the crossing cost. If the public highways are the right-of-way of commercial operators and if these operators have a property right in the highways so that such highways are not under the control of the State, then this

proposition is undoubtedly true. However, in recent cases, notably *Stephenson* v. *Binford*, 287 U. S., 251, 77 L. ed., 288, this Court has emphasized the well established rule of law that the highways of the State are public property, that their primary and preferred use is for private purposes, and that their use for purposes of gain is special and extraordinary, which, generally, at least, the legislature may prohibit or condition as it sees fit. In *Hoover Motor Express Co., Inc., et al.* v. *Fort, et al.*, 167 Tenn., 628, the Supreme Court of Tennessee recognized and gave effect to this principle of law.

Appellant emphasizes the fact that the form of traffic requiring protection upon this highway is interstate and not local travel. The record reveals (R., p. 223) that the character of traffic which will use this road would make a grade crossing more dangerous than if the same volume of local traffic used the road. If local traffic, using the crossing frequently enough to be familiar with existing conditions, was the principal traffic upon the road, the hazard would be reduced. When the road carries a substantial amount of traffic which is not familiar with local conditions, obviously, the hazard of a grade crossing is increased.

Adversary counsel would not seriously contend that the safety and convenience of interstate traffic were less important than the safety and convenience of local traffic. Yet the argument apparently is that if safety of local traffic demanded the separation the police power might be exercised validly when it cannot be exercised if the safety of through traffic demands the separation.

We have heretofore pointed out that in numerous cases this Court has held the police power to in-

clude public convenience as well as public safety. In the case at bar it is not contended that the underpass ought not to be constructed in the interest of public convenience and safety. The insistence is that the safety and convenience of the traveling public require the separation and that the relative benefit accruing to travel upon the highway is so vastly greater than the benefit of the railroad as to make the statute involved invalid. In the case of *New York N. E. R. Co.* v. *Town of Bristol, supra,* and in many other cases, this Court has sustained the statutes "irrespective of benefits." Appellant now insists that the relative benefit has changed so that a railroad secures even less advantages from a separation than ever before. This is immaterial unless the principle upon which cases heretofore decided that statutes are sustainable "irrespective of benefits" is not correct. In other words, this Court has said that these changing conditions are not those which affect the validity of such a statute.

The appellant railway has not been harshly treated by the State of Tennessee in the enforcement of its grade crossing separation statute. The Highway Department in Tennssee was organized in 1919 and from the time of its organization through December, 1931, its total expenditures upon public highways were approximately $190,000,000.00. (R., pp. 185, 186.) The statute requiring railroads to share the cost of grade crossing eliminations was enacted in 1919. Since that statute was enacted the appellant railway has contributed, pursuant to the provisions of this statute, approximately $250,000.-00 on grade crossing projects in Tennessee. (R., p. 400.) The State Highway System of Tennessee is practically complete. (R., p. 205.) Expenditures

under this statute, which are limited to grade crossings "on any of the main traveled highways designated by the Commissioner as included in the general highway plan of the State," in the future will necessarily be restricted because the number of grade crossings existing in the State Highway System is limited.

The fact that the constitutional validity of this statute had never been determined by the Supreme Court of Tennessee prior to the present suit is strong evidence that no effort to abuse the power confided in the Department of Highways by it was ever made. In other words, in the elimination of grade crossings the appellant railway, running from one end of Tennessee to the other, has been called upon to contribute one-eighth of one per cent of the amount expended for highways and such contribution has never before been demanded in any case which the railroad thought sufficiently important to litigate. Indeed, the attack here is not upon the propriety of eliminating a particular crossing but upon the unfair economic conditions, sought to be established by national statistics and not by especial reference to Tennessee, which allegedly treat railroads unfairly. (R., p. 26.)

Reference is made by appellant to the fact that the United States has no police power, from which the conclusion is sought to be drawn that because federal aid funds were spent upon this road the State is without police power to require a grade crossing separation. The statutes of Tennessee are designed to provide a state system of highways. The road in question is a state highway notwithstanding the expenditure upon it of federal funds. The State clearly has police power and it is the exercise of its

power, and not of the power of the United States, which is invoked to sustain the elimination in question. The fact that the Federal Bureau of Roads adopts the policy of eliminating railroad crossings from federal aid roads is evidence that such crossings are dangerous and inconvenient. Of course, we do not insist that this is conclusive. In any case, the railroad might show that a particular crossing was not dangerous or inconvenient and that the expenditure was so excessive that the elimination ought not be required. In such case, the railroad could not be required to contribute but this would not be upon the theory that the Federal police power was invoked but upon a finding that the elimination of the crossing involved was unreasonable.

The construction of the new Highway 20 results in the elimination from the State Highway System of eight grade crossings by the construction of one underpass. (R., p. 199.) Appellant's brief, page 2, states that the old route 20 will be continued to meet demands of local travels. This statement is true but it does not mean that the old route 20 will be continued as a part of the State Highway System. The eight grade crossings in question have been eliminated from the State Highway System. No liability upon the railroad under the statute exists to contribute to the elimination of these crossings. Obviously, the Commissioner of Highway does not include them in the highway system and if he sought to do so for the purpose of requiring the railroad to eliminate them, such action would be held unreasonable. The statutes provide for a state highway system connecting adjacent county seats. The new route 20 does this and eliminates from the Highway System the old route 20.

We have heretofore endeavored to show that the public policy of Tennessee does not discriminate against railroads. However, assuming, but not conceding, that the public policy of Tennessee, as evidenced by its statutes and decisions, is discriminatory, we do not believe that such fact would invalidate the present statute. Allegations that the public policy of Tennessee is to minimize restrictions on motor vehicles and to impose burdens on railroads and that the taxing system of Tennessee is more burdensome on common carriers by railroad than on common carriers by motor vehicle are immaterial to the determination of whether or not a grade crossing elimination statute is constitutional. This is true because such statute is enacted under the police power and because of the essential nature of the police power. The police power is a necessary attribute of sovereignty. Upon it the very existence of government depends. It is said to be the most essential and the least limitable of the powers of government. The police power is in no wise dependent upon the taxing power.

Neither contract nor prescription can be introduced to defeat the exercise of the police power, nor can estoppel be invoked as against public interest.

With these elementary principles in mind it is clear that the enforcement of a police regulation cannot be defeated because there is a discrimination in taxing statutes separately enacted which unconstitutionally favor the competitors of the one resisting the police regulation. A question of this kind could be raised only in a taxing suit. Two wrongs do not make a right. If the railroad is aggrieved by the taxing statutes of Tennessee, such grievances must be litigated in a suit to resist a tax or to compel

taxing officials to assess its competitors. This question could not be raised to defeat the enforcement of a police regulation.

Most of the evidence introduced on behalf of the railway is intended to prove that there has been a revolution in transportation methods resulting from the development of motor vehicles and the improvement of public highways. This evidence is also designed to show the disastrous effect on the revenue of railroads resulting from highway competition. There is a substantial amount of truth in the contention that highway building has adversely affected the economic condition of railroads. The facts resulting in a public policy which requires a railroad to contribute to the elimination of a grade crossing have, to some extent, changed but we do not think that such a change presents a justiciable controversy. This Court in many cases has recognized the general principle that the courts have nothing to do with questions of public policy and the power of state legislatures is limited only by the Constitution. When the attack upon a statute reduces itself to a question of the policy of the statute the courts cannot consider the attack. With the wisdom of legislation and the soundness of the economic policy therein expressed the courts are not concerned.

In the recommendation of the National Transportation Committee (the so-called Coolidge Committee), it is said:

> "State laws requiring railroads to make capital expenditures for grade crossing elimination in excess of capitalized savings in operating expenses therefrom should be repealed."

No doubt appellant's able counsel agreed with this recommendation. The appellant Railway endeavored to persuade the Tennessee legislature in 1931 to repeal the law in question. (R., p. 28.) The legislature declined to do so. Adversary counsel now appeal to this forum. They seek to litigate an economic question. They seek to have the courts legislate for them because the legislature refused to do so. Perhaps in view of the change in transportation policy, the statute herein attacked ought to be repealed but the legislature must do the repealing. The Transportation Committee recognized this in its recommendation.

The present litigation is really an effort to change the public policy of the State of Tennessee. When a subject lies within the police power of a state, debatable questions as to reasonableness are not for the court but for the legislature, which is entitled to form its own judgment. It is upon this principle that we rely. The crossing in question ought not be a grade crossing. Under principles of constitutional law heretofore announced by this Court, the railroad may be required to share the cost of separation, "irrespective of benefits."

For the foregoing reasons we believe that the judgment of the Supreme Court of Tennessee ought to be affirmed.

Respectfully submitted,

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